RECORD AND BRIEFS

No. 15-577

IN THE
Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,

Petitioner,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,

Respondent.

On Writ of Certiorari To The
United States Court of Appeals
For The Eighth Circuit

BRIEF FOR BELMONT ABBEY COLLEGE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Missouri may exclude religious organizations, because of their religious nature, from equal participation in entirely secular public programs without violating the Equal Protection Clause?

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INTEREST OF *AMICUS CURIAE*

Amicus Belmont Abbey College is a Catholic liberal arts college in Belmont, North Carolina.[1] It was founded in 1876 by an order of Benedictine monks who built the campus with bricks they formed by hand from the red clay of the North Carolina soil. Today, the monastery operates in the center of campus, and the monks of the Abbey continue to live on the campus of the College and sponsor it.

Religious faith is central to the identity and mission of the College, which describes itself as a "Benedictine Catholic College that finds its center in Jesus Christ. Today, as in years past and in the future, our college is inspired by St. Benedict's desire 'that in all things God may be glorified.'" The College adheres to the Apostolic Constitution *Ex Corde Ecclesiae* of Pope John Paul II, which is the Church's teaching on the role and conduct of Catholic colleges and universities.

Amicus submits this brief to ask the Court to rule that the Equal Protection Clause forbids governments from discriminating against religious organizations or individuals because of their religious identity and excluding them from equal participation in public life. Where a state's

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[1] All parties have consented to the filing of this *amicus curiae* brief pursuant to Rules 37.3 and 37.6 of the Rules of the Supreme Court. No counsel for a party authored this brief in whole or in part, and no one other than *amicus*, its members, or its counsel made any monetary contribution toward the brief's preparation or submission.

constitution relegates religious groups to an inferior status under the law—forcing them to amend the state's constitution to even participate in public programs on equal footing with non-religious groups—the state has violated the Equal Protection Clause and its actions are invalid.

INTRODUCTION AND SUMMARY OF ARGUMENT

For millions of Americans, and for hundreds of thousands of organizations those Americans have formed, religion is central to identity and self-definition. Yet the State of Missouri insists that religious organizations cannot participate in public programs on equal terms with other citizens solely because of their religious identity. Worse, Missouri enshrines this discrimination in its state constitution, thus depriving religious groups of equal rights unless and until they amend the state constitution to obtain equal status with the rest of society. That discrimination against religious groups, because they are religious, violates the Equal Protection Clause.

This Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996) provides an almost perfect parallel to this case, and to the problem of Blaine Amendments more broadly. Just like in *Romer*, the State here has singled out a particular group, based on its identity, for disfavored treatment under the law. Just like in *Romer*, the discrimination has been enshrined in the state constitution, forcing the disfavored group to suffer discriminatory treatment unless and until it is able to convince lawmakers or voters to change the

state constitution. *Romer*'s resolution is tailor-made for this case as well: "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Romer*, at 633.

The Equal Protection Clause protects all citizens from this kind of discrimination, including religious groups. Article I, § 7 of the Missouri constitution runs afoul of this principle and is therefore invalid.

ARGUMENT

I. Article I, § 7 is Impermissible under *Romer v. Evans*

"Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that the government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer*, at 633. Accordingly, "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.*

In *Romer*, the Court held that an amendment to the Colorado state constitution ("Amendment 2") that prohibited the LGBTQ community from obtaining status as a protected class (except through further amendment of the Colorado constitution)

violated the Equal Protection Clause. In reaching this conclusion, the Court found that Amendment 2 "identifies persons by a single trait and then denies them protection across the board." *Romer*, at 633. The Court further found that Colorado's action was inconsistent with a central principle of the "Constitution's guarantee of equal protection"—*i.e.*, "that government and *each of its parts*" should remain open to all. *Id.* (emphasis added). The Court held that the Colorado amendment singles out the LGBTQ community as a class for special treatment by limiting that class, and that class only, to redressing political grievances at the state constitutional level.

In addition, the Court in *Romer* observed:

> A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "If the constitutional conception of 'equal protection of the laws means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."

Id. at 634 (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)) (emphasis in original).

The Court then found that the breadth of Amendment 2 was "so far removed" from the justifications offered by Colorado—*i.e.*, the freedom of association of others and the conservation of state resources—that "it [was] impossible to credit them." *Romer*, at 635. As a result, the Court held that "Amendment 2 classifies [those who self-identify as LGBTQ] not to further a proper legislative end but to make them unequal to everyone else." *Id.* "[I]t is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.*

Article I, § 7 of the Missouri Constitution is indistinguishable in all relevant respects from the amendment that the Court found unconstitutional in *Romer*. As in *Romer*, the state constitutional provision at issue here precludes equal participation by "any church, sect or denomination of religion" or "any priest, preacher, minister or teacher thereof' in government programs. And as in *Romer*, the targeted group is restricted to seeking redress of its political grievances solely through the state constitutional process, while all other state citizens may effectuate change in public policy through laws, regulations, or administrative discretion. *See* MO. CONST. art. I, § 7. The harm that results from this classification is real and tangible. The court below found that "it now seems rather clear that Missouri could include the Learning Center's playground in a non-discriminatory Scrap Tire grant program without violating the Establishment Clause." *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 784 (8th Cir. 2015). In other words, except

for Article I, § 7, the Scrap Tire program administrator could have awarded a grant to Trinity Lutheran because Trinity Lutheran satisfied the other, neutral program criteria. But Trinity Lutheran could not participate, and could not even petition or persuade the program administrator to act on such basis. Rather, as in *Romer*, Trinity Lutheran is limited to seeking change in public policy solely through the state constitutional process.

Furthermore, there is direct evidence that Article I, § 7 was enacted out of actual animus for those with a religious identity, namely Catholics. While in *Romer* the animus was merely inferred from the state's exclusion, here, in addition to the bare fact of the religion-based exclusion, there is also historical evidence that Article I, § 7, like other Blaine Amendments, was part of a wave of anti-Catholic bigotry in the middle of the 19th century. *See* Mier Katz, *The State of Blaine: A Closer Look at the Blaine Amendments and Their Modern Application*, 12 ENGAGE 111, 111-12 (2011); Mark DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J. L. & PUB. POL'Y 551, 607-08, (2003); *see also* Pet. Br. at 42-44.

Yet, even in the absence of actual animus, Article I, § 7 could not survive the rational basis scrutiny applied in *Romer*. This is because the "breadth" of Article I, § 7 as construed by Missouri is "far removed" from the justification offered by Missouri to support it. *See Romer*, at 635. Missouri justifies Article I, § 7 on the grounds that it serves

Missouri's policy against religious establishment. But even assuming that concern is valid in some circumstances, a program to make use of recycled scrap tire is "so far removed" from any plausible danger of establishment that the concern cannot be taken seriously here. Furthermore, by interpreting Article I, § 7 to allow the state to grant "aid" to some private entities and not others—*i.e.*, not "any church, sect or denomination of religion"—Missouri creates precisely the establishment problem that it claims it seeks to avoid. Missouri places its public policy thumb on the scale in favor of "non-religion" over "religion"—no matter how the state defines those terms—thereby establishing the State's interpretation of "non-religion" as favored.

In this respect, Article I, § 7 exerts real pressure on religious groups to renounce their faith or divest themselves of enterprises like preschools. Forcing individuals and groups to give up their religious mission makes them surrender something that is "essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). Respondent has conceded that, but for Trinity Lutheran's *status* as a religious organization, it would have received a grant for playground-safety materials. *See* Pet. Br. at 6-7; Pet. App. 152a-153a; *Trinity Lutheran Church of Columbia, Inc.*, 788 F.3d at 782. Indeed, had Trinity Lutheran renounced its religious status in the grant process, then Missouri would have awarded it the grant money. Surely the government has no valid interest in forcing Trinity

Lutheran to either deny its faith or separate from its preschool.

II. This Case is Even Stronger than *Romer* Because Religion is a Suspect Class

Romer requires a ruling for petitioner even if there is no evidence of animus—simply put, state constitutions cannot exclude targeted groups from equal participation in government programs or equal ability to petition their government for better treatment. But this case is even stronger than *Romer*, both because there is evidence of animus and because religion is a suspect class.

In *Romer*, there was no direct evidence of animus. Rather, this Court inferred animus based on the petitioners' failure to proffer any independent and legitimate justification for the amendment. Here, such an inference is unnecessary because, as explained above, there is direct evidence that Article I, § 7 was motivated primarily (if not exclusively) by anti-Catholic sentiment. This evidence of *actual* animus supports petitioner's equal protection claim in this case even better than the mere inference of animus that the Court found in *Romer*.

Furthermore, it is well-established that religion is among those inherently suspect classes for which the Constitution accords the highest degree of protection. Where state action makes classifications based on suspect classes, those actions are subject to strict scrutiny. *Burlington N. R.R. Co. v. Ford*, 504

U.S. 648, 651 (1992) (laws subject to strict scrutiny are those that "classify along suspect lines like . . . religion"); *Zobel v. Williams*, 457 U.S. 55, 81 (1982) (identifying classifications based on race, religion, or alienage as "inherently suspect"); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (a law is subject to strict scrutiny under the Equal Protection Clause if it "is drawn upon inherently suspect distinctions such as . . . religion"). When Missouri precluded Trinity Lutheran's participation in the Scrap Tire Grant Program, it did so because of Trinity Lutheran's identity as a religious organization. In so doing, Missouri is using a suspect classification.

The Eighth Circuit thus erred when it applied rational basis review to Trinity Lutheran's equal protection claim simply because that claim was also accompanied by an unsuccessful First Amendment free exercise claim. The Eighth Circuit addressed this issue only in a footnote and held that, "in the absence of a valid Free Exercise claim, Trinity Church's Equal Protection Claim is governed by rational basis review." *Trinity Lutheran Church of Columbia, Inc.*, 788 F.3d at 785 n.3. To support this conclusion, the Eight Circuit relied on this Court's decision in *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004).

Locke is inapposite. In *Locke*, the religious identity of those affected by the law was not controlling. In other words, the state action in *Locke* did not purport to classify persons based on their religious *status*. Rather, the law at issue in *Locke* denied state-funded post-secondary school scholarships based on a particular type of activity,

namely seeking degrees in the field of theology. In that case, a religious person could obtain funds to pursue any other degree, such as a physics degree, on the same basis as one who is not religious. Likewise, individuals who were not religious were precluded from using the scholarship funds for the purpose of pursuing theological degrees just like those who were religious by identity. In short, in *Locke*, the law classified the type of degree that could be the subject of the scholarship. It did not classify the citizens who were eligible to receive scholarships on the basis of their religious status. Because the law at issue in *Locke* did not classify citizens by status (or at all, for that matter), the plaintiff's Equal Protection claim was bound up with his First Amendment claims. And in the absence of a valid First Amendment free exercise claim in such circumstances, the rational basis standard of review was permissible under *Romer*. *See Romer*, at 631 ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification as long as it bears a rational relation to some legitimate end.").

By contrast, here, the Missouri action indisputably classifies *religious persons and organizations* on the basis of their religious *status*. Those who are not religious by identity are permitted to receive playground-safety-related funds. Those who are religious by identity are not. This type of status-based distinction raises an equal protection issue that is independent of any First Amendment free exercise issue that also might or might not arise. *See Id.* at 633 ("A law declaring that in general it shall be more difficult for one group of citizens than for all

others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.").

Moreover, the distinction between the type of state action at issue in *Locke* and that at issue in this case is critical. There is simply no plausible chance that recycled scrap tires are the path to establishing religion in any way that is akin to training ministers. And scholarship recipients in *Locke* did not experience the same government pressure to change or deny their identity to participate in the program. Self-identifying as an atheist or agnostic would not have gotten the plaintiff in *Locke* a scholarship to study theology. Self-identifying as a non-church would have gotten the petitioner scrap tires here.

Because Missouri's conduct classifies persons based on their religious status, and because such classifications are deemed targeted at a suspect class, the case here is even stronger than *Romer*.

CONCLUSION

More than a century ago, the Court reiterated a fundamental tenet of the Equal Protection Clause, namely that "no . . . class of persons shall be denied the same protection of the laws which is enjoyed by . . . other classes." *Missouri v. Lewis*, 101 U.S. 22, 31 (1880). This Court applied that same principle in *Romer* twenty years ago to invalidate a state constitutional provision that placed a special disability on a single class in relation to the political process. That holding controls in this case, and it

means that states are not permitted to exclude religious organizations from equal participation in secular government programs or equal ability to petition the government. For the foregoing reasons, *Amicus* respectfully requests that this Court reverse the decision of the Eighth Circuit.

Respectfully submitted,

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